



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

January 28, 2005

Mr. John C. West
General Counsel
Texas Department of Criminal Justice
Office of the Inspector General
P.O. Box 13084
Austin, Texas 78711

OR2005-00830

Dear Mr. West:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 217645.

The Texas Department of Criminal Justice's Office of the Inspector General (respectively the "department" and the "inspector general") received two requests for a specified investigation into the deaths of a department employee and an inmate. You state that the inspector general will release some of the requested information. You claim that the submitted information is excepted from disclosure under sections 552.101, 552.103, and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information. We have also received and considered comments submitted by the first requestor. See Gov't Code § 552.304 (interested party may submit comments stating why information should or should not be released).

As a preliminary matter, we note that you have failed to fully comply with section 552.301 of the Government Code. Under section 552.301(b), a governmental body that receives a request for information that it wishes to withhold from public disclosure must ask for the attorney general's decision and state the exceptions that apply within ten business days after receiving the request. You indicate and the first request reflects that the inspector general received the first request on November 8, 2004. Therefore, you were required to submit your request for a decision, stating the exceptions that apply, by November 23, 2004. Although you timely submitted your initial request for a decision to this office, we note that in your brief of December 1, 2004, you raise section 552.103 as an additional exception to disclosure. Section 552.103 is a discretionary exception that protects the governmental body's interests and may be waived. *See Dallas Area Rapid Transit v. Dallas Morning*

News, 4 S.W.3d 469 (Tex. App.—Dallas 1999, no pet.) (governmental body may waive section 552.103); *see also* Open Records Decision No. 552 at 4 (1989) (discretionary exceptions in general). In this instance, we find that you did not timely raise section 552.103 and have therefore waived this exception.

Next, we note that the submitted information contains medical records, access to which is governed by the Medical Practice Act (“MPA”). Occ. Code §§ 151.001-165.160. Section 159.002 of the MPA provides in part as follows:

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Id. § 159.002(b), (c). Medical records must be released upon the patient’s signed, written consent, provided that the consent specifies (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. *Id.* §§ 159.004, 159.005. Section 159.002(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Open Records Decision No. 565 at 7 (1990). We have marked the portion of the submitted information that constitutes medical records and that may only be released in accordance with the MPA. Open Records Decision No. 598 (1991).

We note that the submitted information also includes Emergency Medical Services (“EMS”) records. Access to EMS records is governed by the provisions of the Emergency Medical Services Act, Health and Safety Code sections 773.091–.173. *See* Open Records Decision No. 598 (1991). Section 773.091 of the Emergency Medical Services Act provides in part:

(b) Records of the identity, evaluation, or treatment of a patient by emergency medical services personnel or by a physician providing medical supervision that are created by the emergency medical services personnel or physician or maintained by an emergency medical services provider are confidential and privileged and may not be disclosed except as provided by this chapter.

...

(g) The privilege of confidentiality under this section does not extend to information regarding the presence, nature of injury or illness, age, sex,

occupation, and city of residence of a patient who is receiving emergency medical services

Confidential EMS records may be released to "any person who bears a written consent of the patient or other persons authorized to act on the patient's behalf." Health & Safety Code § 773.092(e)(4). This consent must be written and signed by the patient, authorized representative, or personal representative and must specify (1) the information to be covered by the release, (2) reasons or purposes for the release, and (3) the person to whom the information is to be released. Health & Safety Code § 773.093(a). Section 773.093(c) also requires that any subsequent release of medical records be consistent with the purposes for which the governmental body obtained the records. Accordingly, except for information enumerated in section 773.091(g), the EMS records we have marked are confidential under section 552.101 of the Government Code.¹ See Health & Safety Code § 773.091(g) (stating confidentiality of EMS records "does not extend to information regarding the presence, nature of injury or illness, age, sex, occupation, and city of residence of a patient who is receiving emergency medical services"). However, the inspector general must release them upon receipt of proper consent pursuant to section 773.093(a).

The submitted information also contains a custodial death report. In Open Records Decision No. 521, this office addressed the confidentiality of custodial death reports and their attachments. Specifically, this office concluded that under article 49.18(b) of the Code of Criminal Procedure, in conjunction with a directive issued by the Office of the Attorney General, Part I of a custodial death report filed with this office is public information, but Parts II through V of the report, including any attachments, are confidential. See Open Records Decision No. 521 at 4-5 (1989); see also Code Crim. Proc. art. 49.18(b) (attorney general shall make report, with exception of any portion of report that attorney general determines is privileged, available to any interested person). Article 49.18 requires that a custodial death report be filed "with the attorney general no later than the 30th day after the date on which the person in custody or the incarcerated person died." Code Crim. Proc. art. 49.18(b). More than thirty days passed between the death of the inmate and the date when the inspector general received this request. Thus, the inspector general must release the entirety of Part I of the submitted custodial death report as information made public by statute. See generally Open Records Decision No. 525 (1989) (exceptions found in statutory predecessor to Act do not apply to information that is made public by other statutes). Parts II through V of the report, including any attachments, are confidential and must not be released.

Finally, you contend that the remaining submitted information is excepted from disclosure under sections 552.108(a)(1) and 552.108(a)(2) of the Government Code. Section 552.108(a) of the Government Code provides as follows:

¹ Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." This section encompasses information protected by other statutes.

(a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime is excepted from the requirements of Section 552.021 if:

- (1) release of the information would interfere with the detection, investigation or prosecution of crime; [or]
- (2) it is information that deals with the detection, investigation, or prosecution of crime only in relation to an investigation that did not result in conviction or deferred adjudication[.]

Gov't Code § 552.108(a)(1)-(2). Please note that the protections offered by sections 552.108(a)(1) and 552.108(a)(2) are, generally speaking, mutually exclusive. Section 552.108(a)(1) generally applies to information held by law enforcement agencies that pertains to criminal investigations or prosecutions that are currently pending. Section 552.108(a)(2) protects law-enforcement records that pertain to criminal investigations and prosecutions that have concluded in a final result other than a criminal conviction or deferred adjudication.

In this instance, you state that the incident at issue is currently being investigated by the Texas Rangers, and that, when the investigation is complete, it will be presented to a grand jury for review, and that one or more criminal charges may be filed. Thus, we understand you to argue that the remaining submitted information pertains to a pending criminal investigation. This argument is properly asserted under section 552.108(a)(1) of the Government Code. Based upon your representation that the remaining submitted information relates to a pending investigation, we determine that the release of this information would interfere with the detection, investigation, or prosecution of crime. *See Houston Chronicle Publ'g Co. v. City of Houston*, 531 S.W.2d 177 (Tex. Civ. App.—Houston [14th Dist.] 1975), *writ ref'd n.r.e. per curiam*, 536 S.W.2d 559 (Tex. 1976) (court delineates law enforcement interests that are present in active cases). Therefore, section 552.108(a)(1) is applicable in this instance.

We note, however that basic information about an arrested person, an arrest, or a crime is not excepted from disclosure under section 552.108. Gov't Code § 552.108(c). Such basic information refers to the information held to be public in *Houston Chronicle*, 531 S.W.2d 177. *See* Open Records Decision No. 127 (1976) (summarizing types of information considered to be basic information). Thus, with the exception of basic information, you may withhold the remaining submitted information pursuant to section 552.108(a)(1).² We note that you have the discretion to release all or part of the remaining information that is not otherwise confidential by law. Gov't Code § 552.007.

² As we are able to make this determination, we do not address your remaining argument against the disclosure of this information.

In summary, the medical records we have marked may only be released in accordance with the MPA. Unless section 773.092 of the Health and Safety Code applies, the inspector general must withhold the EMS records under section 552.101 of the Government Code to the extent that they are made confidential by section 773.091(b) of the Health and Safety Code. The inspector general must release the entirety of Part I of the submitted custodial death report. However, parts II through V of the report, including any attachments, are confidential and must not be released. With the exception of basic information, which must be released, the inspector general may withhold the remaining submitted information under section 552.108(a)(1).

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,

A handwritten signature in black ink, appearing to read "Cary Grace", followed by a long horizontal line extending to the right.

Cary Grace
Assistant Attorney General
Open Records Division

ECG/jev

Ref: ID# 217645

Enc. Submitted documents

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